GOH BROTHERS (E.M.) SDN. BHD.

v.

ENGKI BIN UMAR

HIGH COURT SABAH & SARAWAK, TAWAU
TUAN IAN H.C. CHIN J
[SUIT NO. T 148 OF 1984]
4 JANUARY 1995

***TORT**: Plaintiffs claiming declarations, injunction and damages for detinue and conversion - Plaintiffs entering into tenancy agreement with defendant to store 7,000 cubic yards of crushed river stones on defendant's land until stones completely removed from the land - Defendant selling stones to third party and preventing plaintiffs from entering land to collect stones - Plaintiffs obtaining an injunctive order to restrain defendant from selling stones - Defendant denying plaintiffs' ownership of the stones and counterclaiming for damages - Whether plaintiffs' claim proved.*

On 27 August 1984, the plaintiffs entered into a tenancy agreement to use the defendant's land known as Lot 631, Kawasan Bagahak, Lahad Datu LA 83110313 to store 7,000 cubic yards of crushed river stones (the stones) until the stones were completely removed from the said land. In early September 1984, the defendant sold some of the stones to a third party and subsequently prevented the plaintiffs' or their nominees from entering the land to collect the stones. The plaintiffs filed an action for detinue and conversion and prayed for declarations, an injunctive order and damages against the defendant. The defendant denied the stones belonged to the plaintiffs and counterclaimed for damages purportedly suffered as a result of a restraining order obtained by the plaintiffs to prevent the defendant from selling the stones. The defendant further claimed the tenancy agreement had been lawfully terminated for non payment of rentals from September 1983 to 11 September 1984.

The plaintiffs' witness (PW1) who was the project manager for the construction of a certain road started in 1978 testified *inter alia* that the project required about 100,000 cubic tons of crushed stones for which he had set up a crushing plant at about mile 5 ½ of the road to be constructed. The road was completed in 1980 leaving a stockpile of about 5,000 to 8,000 cubic yards of stones on the site which he claimed belonged to the plaintiffs. He also claimed he could identify the land but he could not confirm whether the plant was set up at Lot 631, Kaware, Bagahak, Lahad Datu. The defendant tendered a documented offer by the Government of Sabah for a lease of a piece of land located at Bagahak with application number 83110313 and Lot number 631 which offer was accepted on 2 June 1983.

Counsel for the defendant submitted that there was no case to answer as the plaintiffs had failed to prove ownership of the crushed stones as the plaintiffs' witness did not identify the stones in question. On the other hand, plaintiffs' Counsel submitted that PW1's evidence was unchallenged as the defendant had failed to give evidence.

Held:

[1] There is substance in the submission of learned Counsel for the defendant. PW1 had testified in general terms and no *locus in quo* was requested despite the fact that this witness had testified he could identify the land. If a *locus in quo* was held this witness could have at least pin-pointed the land concerned where the stones of the plaintiff were alleged to

have been stock-piled. If that was done, all that was needed to establish the plaintiffs' case was to call a surveyor to confirm that the place was within the land described. The witness had said he was unsure whether the land he referred to in his evidence was the land described in the statement of claim but the plaintiffs' Counsel did not point to other evidence to remove this uncertainty.

[Plaintiffs' claim and defendant's counterclaim dismissed with no order as to costs]

Legislation referred to:
Advocates (Practice and Etiquette) Rules, 1988 r. 3
Rules of the High Court, O. 64 r. 5(2)

For the plaintiffs - Chan Wai Ling; M/s. Nicholas Fung Tokuzip & Co.
For the defendant - Lawrence Thien; M/s. Chau & Thien.

JUDGMENT

Ian H.C. Chin J:

This action was taken out on 7 November 1984 and was entered for trial on the 11 December 1985. By consent of the parties the hearing of this action that was scheduled for the 3 December 1987 did not proceed and was adjourned to a date to be fixed. On the 11 March 1992 the Court gave notice that the trial of this action would take place on the 7 July 1992 but despite this long notice only one witness was called on the said hearing date. The trial was again postponed, that time to the 1 February 1994 with the following three days reserved for the trial. But the Court on the 23 September 1993 gave notice of the change of the date of hearing and brought the hearing forward to the 4 October 1993. Unfortunately, the parties were not prepared to proceed on the new date and the case was thus adjourned to the 3 January 1995 being the then dates available at the end of a queue of cases waiting and already scheduled for trial. On the 3 January 1995, the parties were again reluctant to proceed. Applications were made for an adjournment of the hearing yesterday (3 January 1995) all of which I dismissed and the case proceeded. I will first advert to the claim before I set out the reasons while I dismiss the applications for adjournment and why I disallowed an affidavit to be used as evidence without calling the deponent.

The Claim, Defence & Counterclaim

On 27 August 1984, Goh Brothers (EM) Sdn. Bhd. ("the plaintiffs") entered into an agreement with Engki bin Umar ("the defendant") to use the defendant's land comprised in "(survey plan no. 11126917 and known as Lot 631, kawasan Bagahak, Lahad Datu LA 83110313)" for the storage of 7,000 cubic yards of crushed river stones ("the stones"). This agreement, described in the statement of claim as a tenancy agreement, was to commence from the 1 August 1983 "until all the 7,000 cubic yards of crushed river stones are completely removed from the said land". The plaintiff alleged that by the time of the writ, some 4,500 to 5,000 cubic yards of the stones remained. It was further alleged that:

(1) in early September 1984, the defendant sold 1,100 cubic yards of the stones to Yun Min Contractors who in turn sold the same to the Sabah Land Development Board and the Sabah Land Development Board confirmed the sale in a letter dated the 21 September 1984;

(2) in the month of October 1984 the defendant prevented the plaintiffs' nominees from entering the said land to collect 1,800 cubic yards of the stones which the plaintiffs had agreed to sell to the Public Works Department; and

(3) on 12 October 1984 a letter written by the defendant was affixed to the entrance to the said land and the letter prohibited the plaintiffs from entering the said land.

The plaintiffs alleged that defendant had wrongfully prevented them from entering the said land and had committed detinue and conversion. The plaintiffs pray for the following orders, *viz*:

(a) a declaration that the plaintiffs "are and were all material times the lawful tenants of the" said land at Lot 631, Kawasan Bagahak, Lahad Datu LA 83110313;

(b) a declaration that the plaintiff 'are and were at all material times the rightful owners of the 7,000 cubic yards of crushed stones as deposited' and stored at 631, Kawasan Bagahak, Lahad Datu Lahad Datu LA 83110313;

(c) an interlocutory injunction that the defendant be restrained from removing or selling the stones, from hindering the plaintiffs' entry to the said land and removal therefrom of the stones; and

(d) alternatively, that the defendant deliver up the balance of the stones and for damages and conversion to be assessed.

The defendant denies the stones belong to the plaintiffs and counterclaimed for damages for being restrained at the instant of the plaintiffs by an injunction of the Court granted on the 7 November 1984 from selling the stones. The defendant also claims the tenancy agreement to have been lawfully terminated for non-payment of the rentals from the months of September 1983 to the 11 September 1984.

The Applications

Datuk Lawrence Thien, of Messrs Chau & Thien, appeared for the defendant and at the outset of the hearing orally applied for a postponement of the trial on the ground that Mr. V.K Liew who had appeared as Counsel for the plaintiffs had jointed his law firm in November 1994 making it embarrassing for him to act for the defendant and that a Ms Patricia Hiew who handled this case for the defendant had resigned from the firm in August 1994. Messrs Chau & Thien had just a few days before the hearing sent by facsimile a letter dated the 29 December 1994 asking the Court for a postponement for the reasons which I have just set out. In their letter to the Court, Messrs Chau & Thien had adverted to r. 3 of the Advocates (Practice and Etiquette) Rules, 1988 which says:-

3(a) An advocate shall not accept a brief if he is or would be embarrassed.

(b) An embarrassment arises

(i) where the advocate finds he is in possession of confidential information as a result of having previously advised another person in regard to the same matter.

I do not see how Datuk Lawrence Thien can be embarrassed by Mr. V.K. Liew joining his law firm. It is not Mr. V.K. Liew who now acts for the defendant but Datuk Lawrence Thien and neither is there any allegation that Datuk Lawrence Thien had been divulged information by Mr. V.K. Liew relating to the case of the plaintiffs. In the end, it does not matter because the defendant had elected not to call any evidence. What is disconcerting is that lawyers do not see it fit to apply or inform the Court well in advance of the hearing date of any intended application for an adjournment. After all, the Court on the 5 October 1993 gave Counsel notice that the case would be heard on the 3 January 1995, a 16-month notice. There is another reason for my refusal to grant the order discharging Datuk Lawrence Thien or Messrs Chau & Thien from acting for the defendant and it is this. Learned Counsel had failed to comply with O. 64 r. 5(2) of the Rules of the High Court which provides that such

an application must be made by the prescribed summons, supported by an affidavit and served on the defendant. This was not done and there was no explanation for the omission.

Ms. Chan Wai Ling indirectly supported the application by saying that the plaintiffs objects to Datuk Lawrence Thien continuing to act for the defendant for the reason already adverted to. This objection is also, for the same first reason just mentioned, untenable. There was actually another reason, which Ms. Chan Wai Ling was not prepared to tell the Court, for the objection and this was the plaintiffs were also not prepared to proceed with the case as the event turned out because an adjournment was also applied for the plaintiffs in the course of the trial, to which matter I will now turn.

After calling one unnecessary witness on the 3 January 1995, unnecessary because he was giving hearsay evidence, Ms. Chan Wai Ling applied for an adjournment to allow another witness to come to Court to testify. This witness, which the plaintiff did not even bother to subpoena, was according to learned Counsel not free to testify at this sitting. The time for dispensation of justice cannot be dictated by witnesses deciding when to and when not to come to Court. It must be precisely because the witnesses must not be allowed to dictate when they want to attend Court to give evidence that we have writ of subpoena *ad testificandum*, writ of subpoena *duces tecum* and writ of subpoena *ad testificandum* and *duces tecum.* We have given the parties almost 16 month to issue and serve subpoena on the witnesses they wish to call, the plaintiff did not avail this opportunity and I see no reason why the Court's time (and the 'tax-payers' money) should be wasted by adjourning a hearing to allow a witness to come at his own sweet time when the machinery provides for a process to compel appearance at the time the Court has fixed. It was for the reason that I have stated that I dismissed the plaintiffs' application for an adjournment. It was at that stage that the plaintiffs closed its case and the defendant elected to submit that the plaintiffs had failed to prove its case.

The Evidence

The first to testify for the plaintiffs was one Michael Robert Hastie, a civil engineer, who was employed by the plaintiffs as project manager for the construction of a certain road which started in 1978. He testified that the project required approximately 100,000 cubic tons of stones which had to be crushed to serve as the road base. For this purpose he designed, procured and set up the stone crushing plant at about mile 5 ½ of the road that was to be constructed. He testified that he can identify the site where the plant was erected. The site was between 2 to 4 acres where the undergrowth were cleared for the purpose of the plant and at that time there were no stones there. According to him, the site could at any one time hold between 5,000 to 10,000 cubic yards of stones and that lorries continuously carried the crushed stones from the site to the road. The road was completed in 1980 and there was a stockpile of 5,000 to 8,000 cubic yards of stones remaining on the site which belonged to the plaintiffs. Though he said the plant was set up at mile 5 ½ of the road he cannot confirm whether the plant was set up at Lot 631, Kaware, Bagahak, Lahad Datu. The other witness who testified admitted he had no personal knowledge of the facts of this case and there is no point in adverting to his evidence. The documentary evidence are as follows.

The defendant was on the 1 May 1983 offered by the Government of the State of Sabah the lease of a piece of land measuring 14.45 acres which he accepted on the 2 June 1983. The other details stated in the said offer were (1) the application number 83110313, (2) the district name of BAGAHAK where the land was located, (3) the lot number 631 and (4) the plan number 11126917. As for the tenancy agreement, *supra*, the relevant terms say:

(1) the rental for the "piece of land under L.A. 83110313 or otherwise referred to as Lot No. 631 and Survey Plan No. 11126917 measuring 14.54 acres more or less situate in the District of Lahad Datu, Sabah" payable by the plaintiffs to the defendant was RM300 per month for the period from the 1 August 1983 to the 31 August 1984 and RM400 per month for the period from the 1 September 1984 onwards;

(2) the lease was for the storage of about 7,000 cubic yards of crushed river stones and for a continuous period until the crushed river stones were completely removed from the land; and

(3) the defendant can re-enter the land and terminate the tenancy if the rents were in arrears for three months.

There were other documents but since both learned Counsel did not refer to them in their closing speeches, I will also not bother.

The Submissions

It was upon those evidence which I have related that both learned Counsel made their closing speeches after the defendant had elected not to call any evidence. I will, since the speeches are, in my view, very short, reproduce here what both learned Counsel said, *viz*:-

Thien: I am unable to call my witness. I would submit on evidence so far plaintiff has not proved their case. The crux of this matter is the ownership of the crushed stones. Unless the plaintiff can prove they are the owners and entitled to the crushed river stones they cannot get the declarations. Evidence so far, PW1 evidence merely that there were crushed stones left over on the completion of the highway. This conclusion was that they must belong to the plaintiff. Not evidence showing proof on a balance of probabilities. Witness did not identify the stones in question. As far as PW2 is concerned, his knowledge of the matter is merely from the file. Plaintiff has called any other witness so substantiate stones in fact belong to plaintiff in question Ask the Court to dismiss the plaintiff's claim.

Chan: Land approved to defendant in 1 May 1983. According to PW1 the crushed stones left there at end of 1980 when the road was completed. Therefore the stones were already left in defendant's had even before land was approved. There was a tenancy agreement between plaintiff and defendant for storage of crushed stones and the duration of lease was from August 1983 until all the crushed stones have been removed. PW1 also gave evidence that he helped to set up the crusher's plant and normally crusher's plant is situated near the stone deposit. PW1 also stated that after completion of road he viewed the stock pile of the stone and estimated there were about 5,000 to 8,000 cubic yards of stones remaining on the site. What he can't say for sure is whether this site was whether Lot 631 Kawasan Bagahak, Lahad Datu. This was the number given when the land was approved and he was not sure whether this lot 631 is the same site as the stockpile because before the approval of the land it was a state land. PW1's evidence that the stones were left at site not challenged. In cross-examination PW1 said he definitely can identify the site. PW1 is the project manager for the construction of Bakapit-Tungku Road. Therefore he is the best person to know where crushed stones were there. Even though the defendant claimed crushed stones belong to him, he had not come to Court to testify so. If he had come to Court the plaintiff would be able to ask him how he get the stones in the first place. By not attending Court he has deprived the plaintiff from cross-examining him. On a balance of probabilities I humbly submit plaintiff had proved its case and through PW1 especially the ownership of the stone is proved and never challenged.

Conclusions

Those speeches fell far short of closely analysing the evidence and lacking reasons for rejecting the evidence. It can be inferred from the speech of Datuk Lawrence Thien that the

stones which the witness Michael Robert Hastie was talking about cannot be proof of the stones were actually on the defendant's land comprised in "(survey plan no. 11126917 and known as Lot 631, kawasan Bagahak, Lahad Datu LA 83110313)" as pleaded in the statement of claim. Though the evidence was not analysed by both Counsel, I am of the view that there is substance in the submission of learned Counsel for the defendant. Michael Robert Hastie testified in very general terms and no *locus in quo* was held this witness can at least pin-point land concerned where the stones of the plaintiff were alleged to have been stock-piled. If that was done, all that was needed to establish the plaintiff's case was to call a surveyor to confirm that the place that would have been pointed out by Michael Robert Hastie was within the land described in the "Survey Plan No. 1112617 and known as Lot 631, kawasan Bagahak, Lahad Datu LA 83110313" on which the plaintiff alleged they had brought stones to be stored there. This witness had said that he was not sure whether the land he referred to in his evidence was the land described in the statement of claim. Learned Counsel for the plaintiffs did not point to other evidence which may remove this uncertainty. She argued that the stones were, according to the witness, left at the site but it still begs the question whether the site was actually on the land of the defendant and the witness, as mentioned earlier, was not able to say. Upon the premises, I am of the conclusion that the plaintiffs had failed to establish their case and the plaintiff's claim is therefore dismissed. What then of the defendant's counterclaim? Both learned Counsel made no mention of it. Since the defendant did not adduce evidence to prove his counterclaim, the counterclaim is also dismissed. There will be no order as to costs. There remains the question of the injunction that was granted on the 7 November 1984. Again, both learned Counsel did not say anything. Since the plaintiffs' claim is dismissed, the injunction must be vacated and I so order. Since learned Counsel for the defendant did not ask for any inquiry as to damages, I will not order the same.